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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
the Commission's Forfeiture) CI Docket No. 95-6
Policy Statement and)
Amendment of Section 1.80)
of the Rules to Incorporate)
the Forfeiture Guidelines)

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REPLY COMMENTS OF THE
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

The National Telephone Cooperative Association ("NTCA")
submits these Reply Comments to the Notice of Proposed Rulemaking
("NPRM") in the above proceeding ("Notice").

NTCA is a national association of approximately 500 local
small exchange carriers ("LECs") providing telecommunications
services to subscribers and interexchange carriers ("IXCs")
throughout rural and small-town America. Roughly one third of
NTCA's members also operate cable systems in their wireline
service areas.

DISCUSSION

NTCA's members are concerned that they will be adversely
affected by the inflexible forfeiture guidelines the Commission
intends to use despite the decision in United States Telephone
Association v. FCC, 28 F.3d 1232 (D.C. Cir. 1994). The burdens
of having to contest forfeitures based on arbitrary criteria are
particularly onerous for small LECs like NTCA's members who are
providing essential communications services using wireline and
wireless technologies. These companies provide the invaluable
rural infrastructure and state-of-the-art telecommunications

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services. They are, however, small businesses and do not have large staffs or batteries of Washington, D.C. attorneys at their disposal.

NTCA agrees with Emery Telephone and Harrisonville Telephone Company statements that the proposal to retain the guidelines will disproportionately and adversely affect small companies subject to the Commission's jurisdiction. Both Emery and Harrisonville spell out a range of additional burdens the policy imposes on small businesses. These include the maintenance of no longer required logs and the necessity to hire more personnel, including attorneys, engineers and other professionals.¹ Most NTCA members are similarly situated to Emery and Harrisonville and have the same concerns they have. The Commission should specifically indicate how it intends to prevent the imposition of additional burdens on these companies as well as how it will administer the forfeiture authority so as to avoid discriminatory treatment of small businesses. In addition, the Commission should establish procedures to ensure reasonable forfeitures. It should also ensure that administration of any procedures or policies do not discourage new entrants at a time when shifting regulatory policies are aimed at promoting competition as a means to further Universal Service goals.

Southwestern Bell Telephone Company believes that the Commission has failed to comply with the substantive requirements

¹ Harrisonville at 9; Emery at 7-8.

of the USTA decision.² NTCA agrees. The NPRM does not address the core issue in USTA, namely, the Commission's basis for establishing a different starting point or "base amount" in determining and calculating penalties for the same violation by different actors. The Commission appears to believe that it has cured the inherent defects in the guidelines by indicating that the guidelines are "general" and representing that it has the discretion to depart from the guidelines in appropriate circumstances. It is not clear what the Commission will consider "appropriate" circumstances. The Commission's assertion that the guidelines are only "general" is not a remedy. They will still be the starting point used by the Enforcement Staff in every case. The Commission has not articulated any other guidelines but these.

The crux of the USTA ruling on the Commission's substantive error was that the Commission must explain its reasons for establishing higher base amounts for common carriers "as a class." By retaining the guidelines, the Commission is effectively still requiring that common carriers "as a class" pay heavier fines than other licensees. Further the Commission is not explaining why common carriers "as a class" will be subject to heavier fines as a result of the different and higher starting points or "base amounts" used in calculating fines for them. NTCA agrees with the United States Telephone Association position that the proposal to continue to use base amounts will result in

² Southwestern at 3.

discriminatory forfeitures.³

The use of a percentage of the maximum for 26 violations listed in the guidelines guarantees that the guidelines will result in disparate treatment and harsher treatment for common carriers. Although the percentage used to calculate the base amount is the same, the maximum applied to calculate the base penalty for common carriers is always \$100,000 for common carriers and \$25,000 for broadcasters and cable television operators. Under this scenario, assuming two actors subject to forfeiture for any of the 26 infractions applying to the two different groups, and further assuming that no upward or downward adjustments or other appropriate mitigating factors exist for either, the common carrier violator will always pay more under the guidelines.

The fact that 47 U.S.C. §§ 503(b)(2)(A)-(C) provides for different maximum fines among common carriers, cable television operators and broadcasters is no justification for the higher base amounts in the guidelines. 47 U.S.C. §§ 503(b)(2)(A)-(C) sets maximum penalties. The Commission should at least carefully explain how it will apply the guidelines so as to prevent disparate treatment for like violations by similarly situated actors. It cannot assume that Congress intended to punish common carriers for being common carriers.

47 U.S.C. § 503(b)(2)(D) is the provision which governs Commission assessment procedures and defines the limits of the

³ USTA at 5.

Commission's discretion to issue penalties. It requires that the Commission give written notice of forfeiture penalties. It also indicates how and what criteria the Commission must use to determine the amount of a penalty. These criteria are included in the Commission's adjustment factors. NTCA does not contest the proper use of adjustment factors the Commission is required to consider in assessments. It notes, however, that 47 U.S.C. § 503(b)(2)(D) leaves no room for the establishment of discriminatory base amounts or presumptions that automatically subject some actors to heavier fines regardless of mitigating factors.

CONCLUSION

For the above stated reasons, NTCA urges the Commission to revise its proposal to (1) ameliorate the harsh effect on small LECs, cellular services providers and other small providers and (2) prevent the imposition of harsher fines on common carriers than others for the same violation.

Respectfully submitted,

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April 17, 1995

CERTIFICATE OF SERVICE

I, Rita H. Bolden, certify that a copy of the foregoing Reply Comments of the National Telephone Cooperative Association in CI Docket No. 95-6 was served on this 17th day of April 1995, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list.

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